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No. 98-167

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA; JANE DEE HULL, GOVERNOR OF ARIZONA; GRANT WOODS, ATTORNEY GENERAL OF ARIZONA; ARMANDO RUIZ; LINDA AGUIRRE; JOHN PHILIP EVANS; ROSIE GARCIA; CANDIDO MERCADO; MANUEL PENA, JR.; PETER RIOS, JR.; MACARIO SALDATE IV; FEDERICO SANCHEZ; AND VICTOR SOLTERO,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Before considering the question presented by the Petitioners, the Court should consider the following question:

> Do Petitioners, who are the sponsors of the initiative that became Article XXVIII and an individual who voted for the initiative, have Article III standing to appeal the Arizona Supreme Court's decision finding that Article XXVIII violates the Constitution?

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INTRODUCTION

Pursuant to the Court's Order requesting Respondents to respond to the Petition for Certiorari filed by Arizonans for Official English and Robert D. Park, Respondents, the State of Arizona, the Arizona Governor, and the Arizona Attorney General ("State Defendants"), respectfully request the Court to deny the Petition because Petitioners do not have standing to pursue this action.

STATEMENT OF THE CASE

This case concerns Article XXVIII of the Arizona Constitution, the Official English Amendment, which the Arizona Supreme Court determined was unconstitutional, and whether Petitioners, who merely sponsored the initiative that became Article XXVIII and who intervened below, have standing to seek certiorari in this Court from the Arizona decision when the State Defendants have decided not to appeal.

A. Article XXVIII

In October 1987, Petitioners, Arizonans for Official English (AOE), a campaign committee, and its spokesman, Robert D. Park, launched an initiative drive to amend the Arizona Constitution to designate English as the State's official language and to limit state and local government employees' work-time use of any language other than English. (Pet. App. 7a.) In November 1988,

Arizona voters narrowly approved the initiative, which became Article XXVIII of the Arizona Constitution. *Id.*[1]

On January 24, 1989, the Arizona Attorney General issued a formal, published opinion concluding that Article XXVIII could be construed to avoid a conflict with the federal Constitution, and if so construed, Article XXVIII would not affect the delivery of state services in a language other than English:

> We do not conclude that [Article XXVIII] requires a diminution or unreasonable restriction of services or the placing of barriers to access to governmental processes for non-English speakers, because such an interpretation is not required by the text of the amendment itself and could be inconsistent with applicable federal law and the Arizona and United States Constitutions.

Ariz. Att'y Gen. Op. 189-009 (1989). If, on the other hand, Article XXVIII were construed to apply to the day-to-day delivery of governmental services, the Attorney General opined that it could be found unconstitutional:

> We do not interpret [Article XXVIII] as necessitating elimination of assistance provided by government in languages other than English where such assistance is reasonably needed to ensure fair and effective delivery of governmental services to non-English speakers. If this were required, [Article XXVIII] could be found to give governmental effect to private biases by taking away protections legitimately offered to those entitled to them, and thus would be

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[1] The text of Article XXVIII appears in Petition at x-xii.

> voided as a violation, not only of Title VI, but also of the federal and state equal protection clauses.

Ariz. Att'y Gen. Op. 189-009 (1989) (footnote omitted). The Attorney General also opined that "an elected official may have a federal first amendment right to communicate with constituents in the language of choice," and that Article XXVIII should be construed to avoid that conflict. *Id.*

B. The Federal Lawsuit

Shortly after Article XXVIII was passed, a state employee challenged its constitutionality pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Arizona. The district court found that Article XXVIII reached a substantial amount of conduct protected by the First Amendment and that therefore Article XXVIII was overbroad and unconstitutional on its face. *Yniguez v. Mofford*, 730 F.Supp. 309, 313-14 (D. Ariz. 1990). The Court of Appeals for the Ninth Circuit affirmed the finding of unconstitutionality in *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (en banc) ("*Yniguez*").

AOE and Robert D. Parks, who had intervened in the federal matter in the Ninth Circuit, filed a petition for certiorari in this Court. After granting certiorari, this Court vacated the Ninth Circuit decision, finding that the plaintiff's case was moot because she was no longer employed by the State. *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997) ("*AOE*"). The Court stopped short of resolving whether AOE and Park have standing

under Article III to pursue appellate review, but expressed "grave doubts" concerning their standing. *Id.* at 1068.

C. This State Court Challenge

In November 1992, the ten Plaintiffs in the instant case sued the Arizona Governor and the Arizona Attorney General in the Arizona Superior Court for Maricopa County, seeking a declaratory judgment that Article XXVIII violates the First, Ninth, and Fourteenth Amendments to the United States Constitution. Plaintiffs – four state elected officials, five state employees, and one private citizen – are bilingual and regularly communicate in both Spanish and English as private citizens and during the performance of government business. Plaintiffs amended their Complaint to add the State of Arizona as a Defendant.

AOE and Park moved to intervene pursuant to Rule 24(a)(2) of the Arizona Rules of Civil Procedure (which is identical to Rule 24(a)(2) of the Federal Rules of Civil Procedure). AOE asserted that it was entitled to intervene because of the money and labor that it expended in promoting the initiative that became Article XXVIII. Park claimed that he had a legally protectable interest in that his vote could be cancelled if the state court found Article XXVIII unconstitutional. No one opposed AOE and Park's Motion to Intervene, and the superior court granted the motion.

On Cross-Motions for Summary Judgment, the superior court ruled that Article XXVIII is constitutional, finding that it (1) is a content-neutral regulation that does not

violate the First Amendment; (2) does not violate the Equal Protection Clause of the Fourteenth Amendment because there is no proof of discriminatory intent; and (3) does not violate the Ninth Amendment because it does not protect choice of language.

On appeal, the Arizona Court of Appeals reversed (before this Court decided *AOE*), choosing to defer to the Ninth Circuit's decision in *Yniguez* by adopting both the Ninth Circuit's construction of Article XXVIII and its analyses and conclusion that Article XXVIII is unconstitutional. *Ruiz v. Symington*, 1996 WL 309512 (Ariz. App. 1996) (Pet. App. 49a to 58a).

The State Defendants then petitioned the Arizona Supreme Court to review the Court of Appeal's decision. The court granted review and stayed all proceedings pending this Court's decision in *AOE*. After this Court's decision vacating the Ninth Circuit decision, the Arizona Supreme Court lifted the stay, heard argument, and issued its decision. *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (Pet. App. 1a to 48a).

Throughout the state court litigation, the State Defendants argued, consistently with the Attorney General's formal opinion, that Article XXVIII applies to "official governmental acts, but not to day-to-day communication of government employees." (State Defendants' Supplemental Brief in the Arizona Supreme Court at 1.) AOE and Parks also argued that Article XXVIII only applies to official, binding acts of the State and does not prohibit translations. *Ruiz* at ¶ 3. The Arizona Supreme Court, however, rejected this narrow interpretation, agreeing with the Ninth Circuit that the Amendment "could

hardly be more 'inclusive' and that it 'prohibit[s] the use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English.' " *Id.* at ¶ 44 (quoting *Yniguez*, 69 F.3d at 933). The Arizona Supreme Court thus concluded that, given the broad construction, Article XXVIII violates the First Amendment by "depriv[ing] limited- and non-English-speaking persons of access to information about the government when multilingual access may be available and may be necessary to ensure fair and effective delivery of govermental services to non-English-speaking persons," and "depriving elected officials and public employees of the ability to communicate with their constituents and the public." *Id.* at ¶¶ 49, 51. The court also found that Article XXVIII violates the Equal Protection Clause by impinging on the "First Amendment right to petition the government for redress of grievances." *Id.* at ¶¶ 61, 65.

THE COURT SHOULD DENY THE PETITION

A. Petitioners Lack Standing to Maintain This Appeal Absent State Participation.

Petitioner AOE is an unincorporated association – a committee – which promoted the initiative that became Article XXVIII. Park is AOE's Chairman and an individual who claims to have voted for adoption of Article XXVIII. This Court expressed "grave doubts about whether AOE and Park have standing under Article III to pursue appellate review" in *AOE*, 117 S.Ct. at 1068, but did not definitely resolve the issue because the plaintiff's

claim in that case was moot. Although Petitioners now request this Court to review a state court judgment instead of a federal court decision, the Petitioners nevertheless lack Article III standing to pursue this appeal without the participation of the State Defendants.

This Court has previously decided that proponents of a state initiative lacked standing to appeal a finding that an initiative was unconstitutional. *See Don't Bankrupt Washington Committee v. Continental Illinois Nat. Bank & Trust Co. of Chicago,* 460 U.S. 1077 (1983). The Court's summary disposition apparently was triggered by the United States Solicitor General's argument that "where the State has litigated the validity of its law and decided to acquiesce in a holding that it is unconstitutional, it is not the prerogative of private citizens to revive the law through further litigation, even if they might benefit in an abstract way by doing so." Brief of Appellee the United States of America to Dismiss or Affirm, *Don't Bankrupt Washington Committee v. Continental Ill. Nat. Bank and Trust Co.,* 460 U.S. 1077 (1983) (No. 82-1445). The advocacy group in that case – a self-proclaimed citizens' group that drafted and campaigned for the initiative – is identically situated to Petitioner AOE.

This appeal is also precluded by *Diamond v. Charles,* 476 U.S. 54 (1986), where the Court held that a private party did not have standing to pursue an appeal without the participation of the state officials against whom the lawsuit had been brought. In *Diamond,* physicians brought suit against Illinois state officials to enjoin a state law governing abortions. A private physician opposed to abortions intervened in district court. After defending the

law in the district court and the court of appeals, the Illinois officials declined to appeal to this Court, but the private physician sought to appeal the judgment. The Court dismissed the appeal for lack of jurisdiction. In holding that the physician had failed to show that he had standing under Article III to appeal the decision, the Court reasoned that "concerns for state autonomy" preclude private individuals from continuing litigation in defense of a state law after the State has decided not to appeal. *Diamond*, 476 U.S. at 65. The court concluded that "only the State has the kind of 'direct stake' identified in *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972), in defending the standards embodied in [a legal] code." *Id.*

Strong practical and institutional considerations support the holding in *Diamond* and the summary disposition in *Don't Bankrupt Washington*.[2] The State is in the best position to decide whether there should be further appellate review of a judgment entered against the State or its officials.

Here, the Arizona Governor and Attorney General decided not to appeal the Arizona Supreme Court decision for a number of compelling reasons. First, because the Arizona Supreme Court construed Article XXVIII very broadly to apply to state elected officials and employees and to all their on-the-job speech, the Attorney General and the Governor were precluded by their

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[2] *See also AOE v. Arizona*, 117 S.Ct. at 1068 ("Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.") (citing *Don't Bankrupt Washington*).

consistent position throughout this litigation and the federal litigation from arguing that Article XXVIII is constitutional. In particular, the State Defendants had argued that Article XXVIII should be construed to apply only to official, binding acts of government to avoid constitutional problems that could result from a broad construction.[3] Petitioners agreed that Article XXVIII should be construed to apply only to official, binding governmental acts. AOE's Brief on Petition for Review in the Arizona Supreme Court at 3, 9, 10; *see also AOE*, 117 S.Ct. at 1074 ("At oral argument on December 4, 1996, counsel for petitioners AOE and Park informed the Court that, in petitioners' view, the Attorney General's reading of the Article was 'the correct interpretation.' Tr. of Oral Arg. at 6; *see id.*, at 5 (in response to the Court's inquiry, counsel for petitioners stated: '[W]e agree with the Attorney General's opinion as to [the] construction of Article XXVIII on [constitutional] grounds.' ")). Moreover, this Court is bound by the Arizona Supreme Court's construction of Article XXVIII. *See Johnson v. Fankell*, 117 S.Ct. 1800, 1804 (1997); *Wisconsin v. Mitchell*, 508 U.S. 476, 483, 113 S.Ct. 2194, 2198 (1993). Thus, the Governor and Attorney General reasonably chose not to appeal the Arizona Supreme Court's finding that, as construed broadly, Article XXVIII is unconstitutional.

Second, although the Arizona Supreme Court's failure to address the State's authority to control its own speech and to regulate its employees' speech is troubling,

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[3] Petitioners incorrectly assert that the State argued that Article XXVIII is constitutional notwithstanding its breadth. AOE's Petition at 9 n. 4.

the Governor and the Attorney General reasonably determined that the impact of the decision could be limited to Article XXVIII because of the court's numerous caveats. The court did not address the government's right to choose the content of its speech, *see Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819, 833-34 (1995), or the substantial deference accorded to the State as employer to restrict its employees' on-the-job speech, *see, e.g., Connick v. Myers*, 461 U.S. 138, 147 (1983).[4] To limit the impact of its decision, however, the court "emphasize[d] that nothing in [the] opinion compels any Arizona governmental entity to provide any service in a language other than English." *Ruiz* at ¶ 3. The court also cautioned that it did not "prohibit government offices from adopting language

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[4] Without discussing *Connick v. Myers* and its progeny, the court stated: "Assuming *arguendo* that the government may, under certain circumstances and for appropriate reasons, restrict public employees from using non-English language to communicate while performing their duties, the Amendment's reach is too broad." *Ruiz* at ¶ 45. Later, the court relied on *United States v. National Treasury Employees Union*, 513 U.S. 454, 465-66 (1995) ("*NTEU*"), to support its conclusion that prohibiting an elected or appointed government official or an employee from communication with the public violates the employee's and the official's rights, *Ruiz* at ¶ 51, without discussing this Court's reiteration of the principle that the government may impose "restraints on job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *NTEU*, 513 U.S. at 465. Nor did the court acknowledge that the ban in *NTEU* concerned public employees' speech outside the workplace, or in any way attempt to fit this case within the framework developed by this Court in *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563 (1968); *Connick v. Myers*, and *Waters v. Churchill*, 511 U.S. 661 (1994).

rules for appropriate reasons,"[5] but found that Article XXVIII "goes too far because it effectively cuts off governmental communication with thousands of limited-English-proficient and non-English-speaking persons in Arizona, even when the officials and employees have the ability and desire to communicate in a language understandable to them." *Id.* at ¶ 51. And, the court did not find that a language minority constitutes a suspect class for equal protection purposes.[6] *Id.* at n. 12. The court concluded: "Significantly, in finding the amendment unconstitutional, we do not hold, or even suggest, that any governmental entity in Arizona has a constitutional obligation to provide services in languages other than English, except, of course, to the extent required by federal law." *Id.* at ¶ 72. Thus, because of the court's limiting statements, the State Defendants reasonably concluded that the *Ruiz* decision would have limited precedential effect.

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[5] Indeed, the court recognized that there are many English language requirements under federal and Arizona law. For example, the court noted that federal law and the Arizona Constitution require that Arizona schools be conducted in English, *Ruiz* at ¶ 20 (quoting the Arizona-New Mexico Enabling Act of 1910, ch. 310 § 20(4) ("the Enabling Act")), and that all state officers and members of the Legislature be able to read, write, speak, and understand the English language. *Id.* (quoting § 20(5) of chapter 310 of the Enabling Act).

[6] Instead, the court concluded that Article XXVIII curtails First Amendment rights and therefore must survive strict scrutiny. This conclusion is troubling because the court did not need to reach the equal protection argument and because the court did not appropriately limit the breadth of its decision.

Finally, the Governor and the Attorney General reasonably concluded that further litigation concerning the constitutionality of Article XXVIII was not in the State's best interests where the litigation regarding its meaning and constitutionality has spanned more than ten years in six different courts involving nine different published opinions and where both the State and Petitioners have argued that Article XXVIII will not change the operation of state government. Private parties, such as Petitioners, should not be permitted to override the Governor and Attorney General's decision not to appeal the Arizona Supreme Court decision.

B. Petitioners Have Not Suffered Actual Injury.

Although this Court expressed grave doubts about Petitioners' standing in *AOE*, the very same Petitioners apparently believe that they have standing here because this is an appeal from a state court decision, instead of a federal court decision, and because they are bound by the state court decision. *See* Amicus Brief of Washington Legal Foundation, et al. in Support of Petitioners at 11-16. Because Petitioners cannot demonstrate actual injury, however, there is no Article III case or controversy.

In *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), the Court held that the petitioners there had standing to appeal an adverse decision of the Arizona Supreme Court even though the prevailing plaintiffs in the underlying decision would not have had standing to bring the lawsuit in federal court. Central to the Court's decision, however, was its recognition that the petitioners suffered actual injury. In *ASARCO*, individual Arizona taxpayers

and the Arizona Education Association brought suit in Arizona state court seeking a declaration that the state statute governing mineral leases on state lands was void under the Enabling Act. *Id.* at 611. The petitioners, who had intervened in the trial court, held mineral leases that were granted under the state law and invalidated by the Arizona Supreme Court. *Id.* at 618. Thus, the decision that the petitioners requested the Court to review posed a "serious and immediate threat to the continuing validity of [their] leases" and the Court concluded that the petitioners were "faced with 'actual or threatened injury' that [was] sufficiently 'distinct and palpable' to support their standing to invoke the authority of a federal court." *Id.* at 628 (quoting *Warth v. Seldin*, 422 U.S. 490, 500-501 (1975)).

In contrast, Petitioners here are not like the mineral lessees in *ASARCO*. Rather, they are similar to the general taxpayers and the teachers association that the Court in *ASARCO* found would not have had standing to bring suit in federal court. Petitioners are not faced with any actual or threatened injury stemming from the Arizona Supreme Court decision that is any different from that of the general public.

And, although Petitioners are bound by the Arizona Supreme Court decision and therefore precluded from bringing a private enforcement action pursuant to Section 4 of Article XXVIII,[7] they have not suffered Article III injury as a result of the Arizona decision invalidating

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[7] Section 4 of Article XXVIII, entitled "Enforcement; Standing," provides that "[a] person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State."

Article XXVIII.[8] *See AOE*, 117 S.Ct. at 1068 ("Nor do we discern anything flowing from Article XXVIII's citizen suit provision – which authorizes suit to enforce Article XXVIII in state court – that could support standing for Arizona residents in general or AOE in particular to defend the Article's constitutionality in federal court."). This is because Petitioners' injury is no different from that of the general public. This Court has "consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992). Moreover, the Court specifically held in *Lujan* that Congress could not "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the [federal] courts" by creating a private right of action to enforce the law. *Id.* at 577.

Like the private right of action in *Lujan*, the private right of enforcement in Section 4 of Article XXVIII does

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[8] Petitioners' expenditure of time and money to promote Article XXVIII does not satisfy the injury requirement under Article III. *See Diamond v. Charles*, 476 U.S. at 70 (petitioner's liability for attorney's fees in the lower court does not confer standing to challenge the abortion law because the liability for fees is a consequence of petitioner's decision to intervene, but could not be traced to the Illinois abortion law). Petitioners' efforts were designed to put Article XXVIII on the ballot and to persuade voters in Arizona to enact it. Those goals were achieved when AOE's proposed initiative was placed on the ballot and then enacted into law by the Arizona voters.

not confer Article III standing on the citizens of Arizona. Section 4 does not identify the injury it seeks to vindicate or relate the injury to the class of persons entitled to bring suit. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). Moreover, Petitioners have not identified any way in which they would suffer personal harm if Plaintiffs were permitted to speak Spanish while working for the State.[9] Petitioners therefore lack standing and their Petition should be dismissed.

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In sum, this case presents a particularly unsuitable vehicle for resolving the complicated First Amendment issues presented by Petitioners. Instead of accepting for review the first and most extreme (as interpreted by the Arizona Supreme Court) official English provision, the Court would do better to deny certiorari now and allow

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[9] Amici's contention that Petitioners have standing because the Ninth Circuit recognized in *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), that they had expressed "their intention to see Article XXVIII enforced against Yniguez," Amici Brief of Washington Legal Foundation at 15 (quoting *Yniguez v. Arizona*, 939 F.2d 727, 734 (1991)), is wrong for two reasons. First, even if there was a legitimate basis in the *Yniguez* record for concluding that Petitioners intended to enforce Article XXVIII against Yniguez, the record in this case is otherwise. Pursuant to Petitioners' interpretation of Article XXVIII, Plaintiffs' use of Spanish would not be prohibited. *See* Petitioners' Brief on Petition for Review at 3, 9, and 10 and Petitioners' Responsive Brief in the Arizona Court of Appeals at 1, 7, 15, 18, 20. Second, even if Petitioners had threatened enforcement, they suffered no particularized injury that would support Article III standing under *Lujan*.

additional, narrower versions of these laws to go into effect and be reviewed by lower courts. If Petitioners are correct that there is a sweeping grass-roots movement in favor of official English laws, then the issue certainly will return to this Court.[10] Moreover, it plainly would be more appropriate to resolve the constitutional issues presented here where the State is affirmatively defending its own law.

By deferring resolution of the issue, the Court can 1) allow the constitutional question to ripen by permitting additional courts to analyze the issues and thereby obtain the benefit of their insights; 2) have the benefit of seeing different permutations of official English laws to assist in deciding where best to draw any constitutional lines; and 3) avoid having to resolve the thorny Article III standing issue that poses a substantial obstacle to review of the First Amendment issues presented here, and thereby avoid the waste of scarce judicial resources resolving a procedural issue that plainly does not warrant review by this Court. There simply is no crying need for the Court to decide the questions presented at this time. The more prudent course is to allow Arizona's limited precedent to

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[10] Petitioners argue that the decision of the Arizona Supreme Court will distort the political debate by introducing constitutional questions into the political process. Petition at 26-27. But constitutional questions are inherent in the English-only concept. Even if this Court were to hold that the federal Constitution imposes absolutely no restraints on what a State can do in this area (a highly doubtful proposition), state constitutional issues will continue to influence the political discourse. Thus, premature review may undermine the quality of this Court's deliberations on these issues without providing any substantial, corresponding benefit to the political process.

stand and await a better case in which to resolve the difficult constitutional problems posed by English-only requirements.

CONCLUSION

This Court should deny the Petition for a writ of certiorari.

Respectfully submitted,

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